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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 25.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

vs.

ST. LOUIS UNION TRUST COMPANY, as Successor Trustee to LIBERTY CENTRAL TRUST COMPANY, as Sole Residuary Legatee and Distributee of the American Estate of WILLIAM J. ORTHWEIN, Deceased, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The findings of fact and opinion of the Board of Tax Appeals (R., p. 26) are reported in St. Louis Union Trust Company v. Commissioner, 28 B. T. A. 107. The opinion of the Circuit Court of Appeals (R., p. 59) is reported in Helvering v. St. Louis Union Trust Company, 75 Fed. (2d) 416.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 17, 1935 (R., p. 62). The petition for writ of certiorari was filed April 17, 1935, and granted May 20, 1935 (R., p. 64).

STATEMENT OF THE CASE.

THE QUESTION PRESENTED.

The question presented by the case is as follows:

Where a grantor in 1920 transferred property inter vivos upon trust to pay the income therefrom to a daughter, for and during her life, with provision that, upon the death of the daughter, the trust should terminate and the corpus should be reconveyed to the grantor, if he should then be living, or, if he should not then be living, such corpus should be distributed to specified beneficiaries, is the transfer one "intended to take effect in possession or enjoyment at or after his death," under Section 302 (c), Revenue Act of 1924, so as to require the inclusion of the value of the property transferred, in the gross estate of the grantor upon his death in 1925, prior to that of his daughter?

THE FACTS.

The statement of facts contained on pages 2-3 of petitioner's brief is substantially correct. Attention is, however, called to the omission of mention of a limitation contained in the indenture of January 1, 1920, between William J. Orthwein and Mercantile Trust Company, viz.: That indenture provided substantially that, in the event

neither the grantor, nor his wife, nor any child or children of the grantor's daughter, should survive at the death of the grantor's daughter, then, upon her death, the trustee should make distribution of the trust estate in accordance with appointment made by the grantor's daughter by her will. The further provision (to which petitioner referred at page 4 of his brief), for disposal of the trust estate to the next of kin of the grantor was applicable only in the event of a default in the exercise by the daughter of her power of appointment (R., p. 53).

The case was tried upon a stipulation of facts (R., pp. 39-46) to which are appended as exhibits the will of William J. Orthwein and the trust indenture of January 1, 1920, the provisions of which form the basis of this controversy.

SUMMARY OF ARGUMENT.

Respondent contends:

1. That in, and by his indenture in trust of January 1, 1920, the decedent, William J. Orthwein, made a complete transfer of the trust property, reserving no estate or interest in the trust property, other than a right to a revestiture upon the contingency of his surviving his daughter, the life beneficiary of the trust—a contingency which never in fact occurred.

2. That, upon his death, no "transmission" of any estate or interest in the trust property took place, and such death was not the "generating source" of the enlargement of the estates of any of the beneficiaries of the trust, but resulted merely in the obliteration of the possibility of Orthwein's revestiture.

3. That the source of the title of the trust beneficiaries was not the death of Mr. Orthwein, but was the trust indenture of January 1, 1920.

4. That the transfer was, by reason of the foregoing, not one intended to take effect in possession or enjoyment at the death of Mr. Orthwein.

It is further respectfully contended that the controlling decisions of this Court are:

McCormick v. Burnet, 283 U. S. 784, and
May v. Heiner, 281 U. S. 238,

and not, as petitioner contends:

Klein v. United States, 283 U. S. 231,

because, in the Klein case, the grantor had reserved, in his conveyance, an estate in the property conveyed, which passed upon his death to another, whereas in the instant case, as in the McCormick case, the grantor retained only a contingent right to revestiture and his death effected no transmission from the dead to the living, or enlargement of the estates of other beneficiaries, but merely an obliteration of the possibility of revestiture.

ARGUMENT.

THE TRUST INDENTURE.

By his indenture of trust made the 1st day of January, 1920 (R., p. 48), William J. Orthwein conveyed, assigned, transferred and delivered to Mercantile Trust Company, as trustee, certain securities of the par value of $119,000, to hold, manage and dispose of the same as an active trust estate, subject to trusts, duties, powers, conditions and limitations set forth in the instrument. In the instrument the trustee was directed to pay the net income of the trust estate to the grantor's daughter, Mrs. Alma Feraldo, or to expend such income for her support, maintenance and benefit, for and during her life. The trust instrument directed that, upon the death of the grantor's daughter, "if the grantor be still living," the trustee should forthwith transfer, pay and deliver the entire trust estate to the grantor to be his absolutely; but that, if the grantor should not then be living, the trustee should continue to hold the trust estate for the benefit of the grantor's invalid wife, if she should then be living; and that, upon the death of the grantor's wife, if she survive the grantor, or upon the death of the grantor's daughter, in case the daughter was survived by a child or children but not by the grantor or the wife of grantor, then the trustee should continue to hold the trust estate for the equal benefit of the daughter's children, during their minority, and, upon their majority, should distribute the corpus of the trust estate to them or the survivors of them. It was further provided that, upon the contingency of the daughter's death subsequent to that of the grantor and his wife, and without leaving children her surviving, the daughter should have power of appointment of the trust estate by

will, and that, in default of such appointment, the estate should be distributed among the next of kin of the grantor.

The grantor retained for himself no power of revocation or alteration of the trust. The only power to terminate the trust during the life of the grantor rested in the trustee.

According to the terms of the trust instrument, the only possibility of the grantor ever reacquiring an interest in the trust property depended upon the happening of certain contingencies, which in fact never happened. viz.:

1. The termination of the trust by the trustee, during the grantor's life, or

2. The death of his daughter, the life tenant, before his death, plus the then existence of the trust.

Grantor's daughter survived him and the trust was still in existence at the date of his death (R., p. 44), so that neither of the contingencies, upon which he might have reacquired the property, ever in fact happened. At the death of the grantor, his daughter being alive, decedent had "no further individual or beneficial interest" in the trust estate, which passed or could have passed upon his death.

THE CONTENTIONS OF PETITIONER.

The contention of the petitioner is that, by reason of the fact that the grantor reserved the right to be revested with the property, *if he should be living at the time of his daughter's death*, the transfer was one intended to take effect in possession or enjoyment on the grantor's death, within the meaning of Section 302 (c) of the Revenue Acts of 1924 (Br., p. 6). In so contending, the petitioner asserts that the death of the decedent was the "generating source" of

"important and definite accessions to the property rights" of the beneficiaries who were to take in the event *that the daughter survived the grantor.* "Plainly," says the petitioner, "it enlarged their defeasible interest in the property into an indefeasible one."

THE CONTENTIONS OF RESPONDENTS.

It is respectfully submitted that the true situation is the reverse of that posed by the petitioner.

We agree with the petitioner that the dominant purpose of Section 302 (c) of the Revenue Act of 1924, subjecting to tax transfers "intended to take effect in possession or enjoyment at or after" death, was to reach the substitutes for testamentary dispositions. The converse is also true, that, to fall within the clause, a transfer must have testamentary character (*Nichols v. Coolidge*, 274 U. S. 531, 542).

Tested from the standpoint of testamentary character, the facts in the instant case defeat the petitioner's contentions. The divestiture by Mr. Orthwein of his interest in the trust property was complete and irrevocable. At no time during his lifetime, nor even at the moment of his death, did he have such control over the trust property as would have enabled him to revest himself with it or to alter the disposition. The contingencies never occurred upon which such revestiture could take place. He was powerless at any time to change the trust instrument or to revoke or modify the action which he had taken in 1920, when he created the trust. The trust was indefeasible from the moment of its creation, free from the continuing grasp which "testamentary" character implies.

The statutory clause, "to take effect in possession or enjoyment at or after his death," is meaningless when

attempted to be applied to the transfer in question. No possession or enjoyment passed from the grantor at his death, and no possession or enjoyment vested, upon his death, in another. The life estate of his daughter continued uninterruptedly as before, and the contingent remainders remained contingent. As was said by this Court in *Reinecke v. Northern Trust Company*, 278 U. S. 339, the phrase was not intended to include transfers other "than those passing from the possession, enjoyment or control of the donor at his death, and so taxable as transfers at death, under section 401."

The invocation by petitioner of the phrases, "generating sources" or "important and definite accessions to the property rights" of the beneficiaries, is an importation from the law as announced by this Court in cases involving revocable trusts (*Chase National Bank v. United States*, 278 U. S. 327), involving estates by entirety, where the joint estate of the spouses becomes, by virtue of the death of the one, the "generating source" of the other's indefeasible title (*Tyler v. United States*, 281 U. S. 497); and involving other situations where estates came into being as a result of the settlor's death (*Klein v. United States*, 283 U. S. 231):

The phrases descriptive of the doctrine of those other cases have, however, no application to the situation before the Court where Mr. Orthwein's death gave rise to no vestiture of either title or possession in the beneficiaries, but merely resulted in the obliteration of his own theretofore possible right of revestiture. Rather should it be said that the death of the daughter prior to that of the grantor might have been the "generating source" of a destruction of the trust and a revestiture in the grantor. The "generating source" of the titles of the beneficiaries of the trust indenture was the indenture itself.

To sustain a tax in respect to a transfer under the provisions of Section 302 (c) of the Revenue Act of 1924 as one "to take effect in possession or enjoyment" at or after death, it is submitted that there must be a passing of property rights at the death of the grantor, as distinguished from the obliteration of a contingency, in accordance with the terms of a trust instrument which had created the rights and defined the contingencies years before the death occurred. There must be a transfer as a result of death, and not a mere elimination of a contingency.

As the Circuit Court of Appeals in the instant case (Helvering, Commissioner, v. St. Louis Union Trust Company, 75 Fed. [2d] 416, at 418) said:

> "In no proper sense was there an enlargement of the interests of the beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possibility that the property would revert to him into an impossibility. * * * The grantor parted with the title and all beneficial interest in the property, and retained no right with respect thereto that would pass to anyone as the result of his death. * * * The trust instrument was the source of the title, and death merely destroyed the possibility that the trust estate might revert to the grantor."

INCIDENTAL CONTENTIONS OF PETITIONER.

Before examining the authorities in relation to the respective principal contentions of petitioner and respondent, it is desirable to comment upon two incidental contentions made by petitioner, viz.:

(a) While earnestly contending that technical differences, under real property law, between interests conveyed, are not controlling in the interpretation of the

Internal Revenue Law (Brief, p. 15), the petitioner attempts (Brief, p. 11) to argue the case from the standpoint of Missouri property law, by contending that the decedent "created in himself a *vested remainder* subject to divestment by his death," thus "multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders." In support of the contention that the grantor created in himself a "vested remainder," petitioner cites:

Tindall v. Tindall, 167 Mo. 218, 225, where a conveyance to a life tenant (who was childless at the time of the conveyance), and then to the issue of her body forever, was held to create contingent interests in the issue until such issue were born.

Heady v. Hollman, 251 Mo. 632, 638, where a limitation over to heirs was, in view of the context, construed to designate the children of a named living person as the remaindermen, and where such children as a class were held to take vested remainders subject to open and let in afterborn children of the named person.

Green v. Irvin, 309 Mo. 302, 311, where it was held that a devise to a daughter for life, and after her death to her heirs, created a contingent remainder in her heirs.

None of these cases held that a limitation over to a person, upon the contingency of his surviving another, created a vested interest. On the contrary, the Supreme Court of Missouri, in *Dwyer v. St. Louis Union Trust Company*, 286 Mo. 481, 487, has directly held, in a case involving a limitation over to named persons, if "living at the time of her death," that the limitation constituted the persons contingent remaindermen.

Such recourse to local property law merely serves to

emphasize the fact that Mr. Orthwein's interest in the trust estate was purely contingent upon his survivorship. Upon his death prior to that of the life beneficiary, there was no interest of which he could, by further act of his, dispose—there was nothing over which he had testamentary control—there was nothing which passed from him to the living. Whether viewed from the standpoint of the niceties of the property law, or from the standpoint of the substantialities of transmission, which this Court treats as controlling in its interpretation of the Revenue Act, there was, at the death of Mr. Orthwein, not a shifting of interests, but a destruction of the possibility of interest.

(b) Some emphasis is placed by petitioner upon the fact that the tax involved is measured by the supposed "value of the decedent's remainder interest, subject to the daughter's life estate," rather than by the value of the trust property. The supposition of such a value, at the moment of the death which destroyed the possibility of any value coming to Mr. Orthwein, is itself a sophism. Such emphasis, however, tends to divert consideration from the essential question as to whether or not there was a transfer intended to take effect in possession or enjoyment at or after death. If no such transfer was made, there is no subject matter for taxation, and the measure of the tax is immaterial.

THE CONTROLLING AUTHORITIES.

The contentions of the petitioner are contrary to the decided cases of this Court and of the Circuit Courts of Appeals.

The case of *McCormick et al., Executors, v. Burnet, Commissioner of Internal Revenue*, 283 U. S. 784, came

before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. It involved a trust settlement substantially like that in the instant case, to the effect that the trust estate should terminate upon the death of the last survivor of the three children of the grantor (Nettie McCormick), and might be terminated by the grantor with the consent of one or more of her three children, and that, upon such termination, the corpus of the trust estate should be paid and delivered to the grantor, *if she should then be living,* otherwise to the children, etc. The case differed from the case at bar in that it involved the additional reservation by the grantor of income from the trust estate.

The case originated before the Board of Tax Appeals as *McCormick et al., Executors, v. Commissioner of Internal Revenue,* 13 B. T. A. 423, where one of the principal questions decided was whether the transfer made by the decedent was "intended to take effect in possession or enjoyment at or after the death" of the grantor, so as to be taxable under the provisions of Section 402 (c) of the Revenue Act of 1921. One of the arguments of the Commissioner, in support of his contention that the value of the trust estate should be included in the gross estate of the grantor for estate tax purposes, was based upon:

> "the provision that, should the decedent survive the beneficiaries, the trust would terminate, and she would take the trust property" (13 B. T. A., at page 437, referring to Article Third of the McCormick trust settlement as set out in 13 B. T. A., pages 427-428).

The Board of Tax Appeals decided against this contention by saying (13 B. T. A. 438):

> "We are confirmed in this conclusion when we consider that Mrs. McCormick completely divested her-

self of legal title and beneficial ownership five years prior to her death, subject only to certain restrictions and contingencies which in fact never operated."

On appeal from the decision of the Board of Tax Appeals, the Circuit Court of Appeals for the Seventh Circuit (*Burnet, Commissioner, v. McCormick et al., Executors,* 43 Fed. [2d] 277, at 279) held that said provision in the trust conveyance tended to show an intent to create a trust to take effect in possession or enjoyment at or after the death of the grantor, and therefore the value of the trust estate had been properly included in the gross estate of the grantor.

On writ of certiorari this Court, in a per curiam opinion (*McCormick et al., Executors, v. Burnet, Commissioner,* 283 U. S. 784), reversed the decision of the Circuit Court of Appeals, saying:

> "The question in this case is that of the construction of Sec. 402 (c) of the Revenue Act of 1921, Chap. 136, 42 Stat. at L. 227, 278, a provision similar to that of Sec. 402 (c) of the Revenue Act of 1918, Chap. 18, 40 Stat. at L. 1057, 1097, which has already been construed by this Court; and, in this view, there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved, the judgment of the United States Circuit Court of Appeals for the Seventh Circuit is reversed, upon the authority of May v. Heiner, 281 U. S. 238, 74 L. ed. 826, 67 A. L. R. 1244, 50 S. Ct. 286."

This Court, in the McCormick case, therefore gave application, in a case where the grantor reserved a right to retake trust property upon a contingency of survivorship which never occurred, of the same doctrine which it had

theretofore applied in May v. Heiner, to a case involving a reservation by a grantor of a life estate in trust property. In both cases the grantor had made a complete divestiture of his title to the trust-res, and his death resulted merely in obliteration of any reserved rights.

May v. Heiner, 281 U. S. 238, involved a transfer by a decedent, Pauline May, of certain property to her husband and others, as trustees, with provision that the income of the trust estate be paid to grantor's husband during his lifetime, after his death to the grantor during her lifetime, and that, after her decease, the trust property should be distributed equally among her four children, their distributees or appointees. The Commissioner, after the death of the grantor, demanded additional estate taxes, reckoned upon the property held under the trust instrument, on the theory that the transfer was one intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 401 of the Revenue Act of 1918. Suit was brought by the executors to recover the tax paid pursuant to the demand. This Court held that, at the death of the grantor, no interest in the trust property passed so as to subject the value thereof to estate taxes. The Court said (page 243):

> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

The rationale of the opinion in *May v. Heiner*, as already applied in *McCormick v. Burnet* (which was decided upon the authority of *May v. Heiner* and presents precisely the same situation as is presented by the case at bar), applies to the case at bar, viz.:

(a) The disposition was not "testamentary in character," for Mr. Orthwein was powerless, during his lifetime, or at his death by will, to deal with trust property.

(b) The disposition was "beyond recall by the dedecedent."

(c) At the death of Mr. Orthwein "no interest in the property held under the trust deed passed" from him "to the living," but a mere contingency, which might have defeated the contingent remainders of Mrs. Feraldo's children, was obliterated.

(d) Title to the trust property "had been definitely fixed by the trust deed." No act on the part of Mr. Orthwein was needed to complete the dispositon of the trust property, and no act of his could alter or revoke it.

(e) The interest in the trust property, which the grantor possessed immediately prior to his death, "was obliterated by that event." His interest had been a right to retake the property contingent upon his survivorship, and that contingency was eliminated.

The law, as authoritatively determined by *McCormick v. Burnet, Commissioner*, 283 U. S. 784, in extension of the doctrine of *May v. Heiner*, 281 U. S. 238, has been augmented by the decisions in two other cases which have come before this Court, namely, *Helvering v. Duke*, 290 U. S. 591, and *Helvering v. Wallace*, 293 U. S. 600. While these cases did not involve decisive determinations by this

Court of the question in the case at bar, since in the Duke case this Court affirmed the decision of the Circuit Court of Appeals for the Third Circuit by an equally divided court, and in the Wallace case this Court merely denied a petition for writ of certiorari, yet the decisions of the courts below, founded as they are on the authority of *McCormick v. Burnet, Commissioner,* are highly persuasive.

Helvering v. Duke, 290 U. S. 591. This case originated in *Duke v. Commissioner,* 23 B. T. A. 1104. It involved an absolute settlement by the settlor (Duke) of securities in trust for the benefit of his daughter and her descendants, with a provision that, if the daughter died during the settlor's lifetime, the trust estate should revert to him in absolute title. The daughter survived the settlor, so that the contingency upon the happening of which rested the possibility of reversion to the settlor did not occur. On appeal from a determination by the Commissioner that the value of the property transferred should be included in the gross estate of the settlor upon his death, for estate tax purposes, on the theory that the transfer was one intended to take effect in possession or enjoyment at or after the settlor's death, the Board of Tax Appeals sustained the contention of the taxpayers. The reasoning of the Board is so completely appropriate in the instant case that we quote from the opinion of the Board the following passage (23 B. T. A., at 1113, 1114):

> "The decedent made an absolute and unconditional gift of the property embraced in the two trusts. It is true the instruments provided that the property should revert to the decedent if the beneficiary predeceased him, but this was a mere possibility which did not in fact occur. Such possibility of reversion did not prevent the gift from being complete. In the

case of *Commissioner v. McCormick*, 43 Fed. (2d) 277, the Circuit Court of Appeals for the Seventh Circuit held that the fact that the settlor could revoke the trust if the beneficiary predeceased her was a factor to be considered in determining whether the trust was revocable or whether the gift was to take effect in enjoyment or possession at or after death, but the Supreme Court reversed that decision (McCormick v. Commissioner, 283 U. S. 784) on authority of *May v. Heiner*. In the case at bar the trust was not revocable. We passed on a similar question in the case of *Lillian M. Wheeler, Executrix, et al.*, 20 B. T. A. 695, and the Supreme Court in the case of *May v. Heiner*, 281 U. S. 238, decided the question adversely to the Commissioner.

"In this case the trust was actually created and took effect and the property passed to it before decedent's death. Nothing passed at or after his death. The fact that there was a bare possibility that the property which had already passed to the trust for the beneficiary might revert to the grantor during his lifetime, not by any act on his part, does not have the effect of reserving to the grantor any rights or benefits which passed at or after his death. He might have, by a bare possibility, reacquired the property during his life, but he did not. In the case of any gift by a man to his child or wife there is always a possibility that the donee may die, leaving the grantor sole heir, and thus a possibility of the donor reacquiring the property, but clearly this mere possibility is not sufficient to create or reserve in the donor property rights which pass to the donee only at or after the donor's death where the donee has had both the possession and enjoyment thereof during the donor's lifetime. This might equally be true whether the trust instrument contained any such provision or not. This contingency or possibility did not give the donor any rights of control over the property. He could

not have recalled the property to himself. When he died he was not seized or possessed of the property."

The decision of the Board was affirmed by the Circuit Court of Appeals of the Third Circuit in *Commissioner v. Duke*, 62 Fed. (2d) 1057, the Court saying at page 1058:

> "While the amount here involved is large, the decisive principle is simple. The facts and authorities have been so fully discussed by the Tax Board that we confine ourselves to affirming their decree."

This decision of the Circuit Court of Appeals was in turn affirmed by this Court by an equally divided court (*Helvering v. Duke*, 290 U. S. 591), the Chief Justice not sitting.

Helvering v. Wallace, 293 U. S. 600. This case originated in the Board of Tax Appeals as *Wallace v. Commissioner*, 27 B. T. A. 902. It involved a transfer of securities in trust, with reservation by the settlor of the right to receive the net income during her own life, and with provision that the trust estate was to be distributed to the daughter of the settlor on the latter's death, if the settlor's daughter then survived, but that, if the settlor's daughter should die first, the estate was to revert to the settlor. The daughter did not die first. The Board of Tax Appeals held (*Wallace v. Commissioner*, 27 B. T. A. 902, 913) that the death of the settlor was not the "generating source" of any accession to the property rights of the surviving daughter, and that therefore the "mere possibility of a reversion" (27 B. T. A., at 910), which never became an actuality, did not afford the basis of a tax.

The Circuit Court of Appeals for the Second Circuit, in *Commissioner v. Wallace*, 71 Fed. (2d) 1002, affirmed the decision of the Board on the authority of *McCormick v. Burnet*, and *May v. Heiner*, and this Court, in *Helvering*

v. Wallace, 293 U. S. 600, denied the Commissioner a writ of certiorari.

THE CASES RELIED ON BY PETITIONER.

The cases relied upon by petitioner are plainly distinguishable.

Chief reliance is placed by petitioner, in its contentions, on *Klein v. United States,* 283 U. S. 231. In that case this Court had before it a transfer made by one Solomon Klein, by deed whereby he conveyed real estate to his wife for and during the term of her natural life. The deed provided in its habendum clause that, if the wife should die prior to the decease of the grantor, she should, by virtue thereof,

> "take no greater or other estate in said lands, and the reversion in fee in and to the same shall in that event *remain vested* in the grantor, his heirs and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance."

It further provided that:

> "Upon condition, and in the event, that said grantee shall survive the said grantor, then and in that case only, the grantee shall, by virtue of this conveyance, take, have and hold said lands in fee simple unto the sole use of herself, her heirs, and assigns, forever."

This is the state of facts upon which this Court considered the question as to whether, the grantor having died prior to the death of the grantee, there should be included in his gross estate the value of the property transferred, and under which this Court held that:

> "The death of the grantor was the indispensable and intended event which brought the larger estate

into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the Taxing Act and justifying the tax imposed."

While it may be admitted that the technical rules of conveyancing are not determinative on the question of taxability of the transfer, yet there is such a substantial difference between the facts in the Klein case and the facts in the case at bar as to result in an entirely different conclusion as to whether or not "the death of the grantor was the indispensable and intended event which brought the larger estate into being."

In the Klein case the deed which evidenced the transfer made no grant of the absolute title to the property transferred. There remained in the grantor the reversionary estate. There vested in the grantee a life estate, plus a contingent remainder which only became vested upon the wife's surviving the husband. When the husband's death occurred there passed to her the entire fee-simple title and the right to enjoy the estate forever. Death was the "generating source" of the wife's indefeasible title, a title which, by the event, shifted from the dead to the living. Here was a disposition of testamentary character.

In the case at bar the grantor, by his conveyance, parted with the entire absolute title to all of the property subject to the indenture. There was no condition precedent to the vestiture. What he retained was not an estate in the property, but a right to repossess himself of it upon contingencies, viz.: The death of his daughter or the earlier termination of the trust—contingencies which never occurred. When death came to the grantor no change in title or in the right to possession or enjoyment took place. The life estate of Mrs. Feraldo continued as

before. The rights of her children, her legatees, or the heirs of Mr. Orthwein, remained, as before, contingent upon the occurrence of events other than his death. There was no "transmission" and no "enlargement" of the property rights of any beneficiary of which death could have been a generating source. The sole effect of the death was to eliminate the *possibility* of the property reverting to Mr. Orthwein and the elimination of one of the contingencies, the happening of which would have defeated the rights of the children, legatees or heirs.

In the Klein case death was the generative source of an accession; in the case at bar death was the obliterating agency of a mere possibility.

It is respectfully submitted that the Circuit Court of Appeals (*Helvering v. St. Louis Union Trust Company*, 75 Fed. [2d] 416) expressed the controlling distinction between the situation in Klein v. United States and the situation in the case at bar, which it decided upon the authority of McCormick v. Burnett, when it said, at page 418:

> "The distinction between the Klein case and this case, as we see it, is that, in the former the legal title was retained by the grantor and passed to the grantee with the grantor's death, while here the grantor parted with the title and all beneficial interest in the property, and retained no right with respect thereto which would pass to anyone as a result of his death. In the Klein case death was the 'generating source' of title, while in this case the trust instrument was the source of title, and death merely destroyed a possibility that the trust property might revert to the grantor."

Commissioner v. Schwarz, 74 Fed. (2d) 712, cited by the petitioner, sustains petitioner's contentions neither on

the basis of identity in facts nor on the the basis of doctrine. In that case the settlor had conveyed property in trust to pay out of the net annual income thereof a stated annuity to his sister Anna, during her life, and to pay the balance of the net income to himself, if living, and, if not living, over to others. In respect of the corpus, the instrument provided that at the death of his sister Anna,

> "the trustee shall pay, transfer and deliver the principal of the said trust fund * * * to the donor, if then living, and, if not then living, in equal shares, per stirpes, to his descendants, then living, and, if neither he nor any descendant of his be then living, in equal shares to such of his brothers and sisters as shall then be living";

and he named his brothers and sisters. The settlor died, leaving his sister Anna surviving.

From the standpoint of the facts, it is apparent that the situation was substantially different from that in the case at bar, in that the settlor, in the Schwarz case, reserved to himself, not only the balance of the income of the trust estate after payment of the annuity to his sister Anna, but also the right to receive the corpus of the trust estate after her life estate, with the limitation passing the remainder to his descendants, if he, the settlor, were not then living. Upon the death of the settlor prior to the death of the annuitant, the remainder interest might, in the words of the Court, have been considered as having "passed * * * to his descendants," so as to characterize the transfer as one intended to take effect in possession or enjoyment at or after the settlor's death. This is quite a different situation from that presented in the case at bar, where nothing *passed* at the settlor's death, and the mere possibility of a reversion to him was *obliterated*.

Nor does the case sustain petitioner's contention from a doctrinal standpoint, for the Court expressly recognized the doctrine of the McCormick and Duke cases, upon which we rely, to the effect that the "mere possibility of reverter did not have the effect of reserving to the grantor any rights or benefits which passed at or after his death" (74 Fed. [2d], at 714).

CONCLUSION.

It is respectfully contended that, upon the authority of *McCormick v. Burnet, Commissioner,* 283 U. S. 784, and *May v. Heiner,* 281 U. S. 238, the Circuit Court of Appeals in the instant case properly decided that the transfer made by Mr. Orthwein by the indenture of January 1, 1920, was not a transfer intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 302 (c) of the Revenue Act of 1924, because:

(a) The grantor parted, by his conveyance, with the absolute title and all beneficial interest in the property.

(b) He retained no control or power to dominate the trust property. There was no string tied to the conveyance, which he could draw at any time during his lifetime.

(c) The interest which he retained to repossess himself of the property was upon a contingency which never occurred.

(d) When death came to him the interests in the trust property remained the same as before. The life estate continued, and the contingent remainders continued to be contingent remainders. Death was the "generating source" of no accession to the beneficiaries and no trans-

mission whatsoever occurred. The "generating" source of all titles was the instrument itself.

(e) The only effect which the grantor's death had was to eliminate one of the contingencies which might have defeated the rights of the ultimate beneficiaries of the trust, viz.: The possibility of the grantor's surviving his daughter and becoming revested with the property.

(f) It was not the death of the grantor which, according to the terms of his trust instrument, might have effected a transmission, but the death of his daughter, which, had it occurred prior to his death, would have effected a transmission by causing a revestiture in the grantor.

A tax is sought to be imposed under the estate tax law, which, for the purpose, as petitioner states, of reaching substitutes for testamentary dispositions, includes among the transfers subject to tax, transfers intended to take effect in possession or enjoyment at or after death. But there is no substitute here for "testamentry disposition." Upon delivery of the trust instrument a complete alienation, without reservation of any interest which could "pass" or be "transmitted" at the settlor's death, took place. The taxation of such an alienation belongs in the realm of gift taxation and not inheritance taxation.

For the foregoing reasons, it is respectfully submitted, the judgment of the Circuit Court of Appeals should be affirmed.

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BRIEF AMICUS CURIAE

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No. 25.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, as Successor Trustee to Liberty Central Trust Company, as Sole Residuary Legatee and Distributee of the American Estate of William J. Orthwein, deceased, et al., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF AMICUS CURIAE.

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(2) Is a mere possibility of reverter possessed by a decedent at his death (whether it be one which survives his death and is descendible or one which is extinguished by his death) an item of ascertainable value to be included in his gross estate? 4

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF AMICUS CURIAE.

The petition of the Government for a writ of certiorari in this case states the "Question Presented" thus:

> "The decedent created an *inter-vivos* trust with directions (1) to pay the income therefrom for life to a daughter, upon whose death prior to that of the creator the trust should terminate and the corpus be delivered to the grantor; or (2) if the grantor predecease the daughter, for continuance of the trust with disposition of the income and corpus according to future contingencies.

"The question is whether the interest of the decedent therein should be included in his gross estate as a transfer 'intended to take effect in possession or enjoyment at or after his death', under Section 302(c), Revenue Act of 1924."

Contentions Made and Not Made by the Government.

In the "Question Presented", the Government does not claim a tax "upon the interest of the decedent" as upon property *which he owned at his death.* The Government argues that the decedent had a *vested* interest in the property, *which was extinguished by his death,* but it nevertheless seeks to tax his estate upon the basis that he *owned the property at his death,* subject only to an outstanding life estate in his daughter.

To arrive at the tax, the Government takes the value of the property, deducts the value of the daughter's life estate, and includes the difference in the gross estate as the value of the decedent's interest in the property *at his death.* The Government makes no mention of the idea that the tax is to be laid as upon assets *owned by a decedent at death* but argues that the incidence of the tax rests in the taxability of transfers intended to take effect at or after death.

The Government does not contend that the transfer involved was made in contemplation of death.

It is obvious that *all* interests owned by a decedent at his death are part of (what we call for convenience) his probatable estate; but this, of course, is not true of interests owned *until death* but extinguished *at or by death.* It follows that if the decedent here involved, owned any interest *which survived his death,* such interest should be taxed *as part of his estate.* It should not be taxed as property included in a taxable transfer, made during life, unless, of course, the decedent's retained interest, in and of itself, made the entire transfer taxable as one intended to take effect at or after death.

It is plain that a reserved right of enjoyment or, to con-

trol the disposition of property which does *not continue until death* does not involve a taxable transfer as one intended to take effect at or after death.

Thus the Government (a) does not argue that the decedent held any interest in the property, at his death, which was not extinguished by his death; and (b) does not contend that the transfer was made in contemplation of death. Hence the case turns upon (1) what is meant by a transfer intended to take effect in possession or enjoyment at or after death and (2) whether such a transfer is shown by the facts of the case.

The following questions are or may be involved in the case:

1. Whether, during the life of his daughter, the interest of the donor in the transferred property was more than a mere possibility of reverter.

2. Whether a mere possibility of reverter possessed by a decedent at his death (whether it be one which survives his death and is descendible or one which is extinguished by his death) is an item of ascertainable value, to be included in his gross estate.

3. If a mere possibility of reverter is taxable, can it be taxed under a provision which taxes transfers "intended to take effect in possession or enjoyment" at or after the donor's death.

We deal with these in the order in which they are stated.

1. During the Life of His Daughter Was the Interest of the Donor in the Transferred Property More Than a Mere Possibility of Reverter?

We are not concerned with the interpretation which may be placed upon the conveyance involved in this case as leading to the view that it created a vested defeasible remainder in the donor or a contingent remainder in his daughter or otherwise. We recognize (as was said in *Klein* v. *U. S.*, 283 U. S. 231) that "nothing is to be gained by multiplying words in respect of the various niceties of the

art of conveyancing or the law of contingent and vested remainders." However, it is to be said that "unless we treat such formal distinctions as real, the law will melt away and leave not a rack behind." (per Hand, J. in *Commissioner* v. *City Bank Farmers' Trust Co.*, 74 Fed. (2nd) 242, 247)

We submit this brief upon the assumption that it may be held that the only interest in the transferred property retained by the donor to his death, was a mere possibility of reverter. The incidence of a tax as applied to a greater interest, is not here dealt with.

2. Is a Mere Possibility of Reverter Possessed by a Decedent at His Death (Whether It Be One Which Survives His Death and is Descendible or One Which is Extinguished by His Death) An Item of Ascertainable Value to be Included in His Gross Estate?

In its nature, a possibility of reverter is not taxable for the following reasons:

(a) *It is the well-established common law rule that a possibility of reverter is not an* INTEREST *in property and that the owner of a defeasible estate to which a possibility of reverter is annexed, is universally treated as the owner of the* ENTIRE *interest therein and the grantor as the owner of* NO *interest therein, until the event happens upon which the defeasance is worked and the reversion is accomplished.*

> "The proprietor of a determinable fee, so long as the estate in fee remains, till the contingency on which the estate is limited occurs, has all the rights and privileges over it that he would have if tenant in fee simple. After such a grant no right of seisin or possession remains in the grantor. All the estate is in the grantee, notwithstanding the qualification." 23 Ruling Case Law. 1104.

> "A possibility of reverter is neither an estate nor an interest in * * * property, nor an assignable nor a

devisable chose in action, nor a possibility coupled with an interest, but a bare possibility alone."

Trustees of Calvary Presbyterian Church v. Putnam, 221 App. Div. 502, 504 (affirmed 249 N. Y. 111).

"The possibility of reverter, where land has been conveyed by a deed which provides that the property shall revert to the grantor in case it ceases to be used for the purposes for which it was granted, is not such an estate as the grantor can convey or assign, and does not pass under a quit-claim deed made before the reverter takes place." North v. Graham, 235 Ill. 178; 85 N. E. 267 (Syllabus 2 in 235 Ill. 178).

"Where real estate is taken by a municipality for a public use, one whose interest in the land is a mere possibility of reverter upon a determinable fee, or a right of entry for breach of condition subsequent, has no ownership therein which entitles him to damages for the taking." Lyford v. Laconia, 75 N. H. 220; (Syllabus 3).

See also:

Upington v. Corrigan, 151 N. Y. 143.
Calvary Presbyterian Church v. Putnam, 249 N. Y. 111.
3 Thompson on Real Property, Sec. 2111.

Indeed, in all creations of defeasible estates, where no right of reverter is expressly reserved, a possibility of reverter exists *as matter of law*. This is upon the theory that a grantor reserves all rights which are not unequivocally granted by his conveyance. It is true that, in many instances, an express provision for reverter is inserted so as to make clear that the estate conveyed is defeasible, but if a defeasible estate is clearly created, no provision for a reverter is necessary.

"It [a reversion] differs from a remainder in that it arises by act of law, whereas a remainder is by act of the parties."

Minor and Wurts, Real Property, Sec. 660, p. 529.

(b) A mere possibility of a reverter is not taxable because of the inherent practical difficulties in ever arriving at its value.

Cases can easily be imagined where the number of contingencies upon which the reverter is based is numerous, making any valuation of the possibility of the reverter impossible except by "mere speculation bearing the delusive appearance of accuracy" which would be a "guess" or a "gamble" rather than a valuation based upon competent factors as pointed out by Mr. Justice Brandeis in *Humes* v. *United States*, 276 U. S. 487, 494.

In the case just cited, this Court held that a contingent bequest to charity was not deductible from the gross estate of a decedent for estate tax purposes because it was impossible of valuation in view of the contingencies upon which it was limited to take effect.

See also in this connection, *Burnet* v. *Pacific Southwestern Trust & Savings Bank* (9 C.C.A., 1930) 45 Fed. (2d) 773 (Certiorari denied, 283 U. S. 825).

The possibility of a reverter such as we are dealing with in this case (if the donor's reserved right be held to be such and nothing more) did not survive the donor's death; it was extinguished at his death. For this reason, it did not and could not constitute a probatable asset. There are cases, however, where a possibility of reverter exists which survives a grantor's death and descends (by right of representation) to his heirs, as at common law, or to his assignees or devisees under statutory authority (*Upington* v. *Corrigan*, 151 N. Y. 143; *Calvary Presbyterian Church* v. *Putnam*, 249 N. Y. 111).

(c) If proposition (a) above is not to be accepted as fully as stated, nevertheless the possibility of a reverter which depends upon a person with a shorter life's expectancy (as a father) surviving a person with a longer life's expectancy (as an adult daughter), which is the case here, is more imaginary than real having regard to the practical affairs of life.

In "Restatement of Property" Tentative Draft No. 4 transfers *inter vivos* are dealt with in Chapter 6, pp. 12-48, and succession on death in Chapter 7, pp. 49-64.

It is stated therein that a possibility of reverter is transferable in life and transmittable at death.

Even if the Restatement be accepted, all the practical difficulties of dealing with a possibility of reverter as an interest in property to be valued and taxed still remain.

3. If a Mere Possibility of Reverter is Taxable Can It Be Taxed Under a Provision Which Taxes Transfers "Intended to Take Effect in Possession or Enjoyment at or After" the Death of a Grantor?

Transfers "made or intended to take effect in possession or enjoyment after the death of the grantor" were first taxed in Pennsylvania in 1826. *Reish* v. *Commonwealth*, 106 Pa. St. 521.

The most that could be said for such a statute, would be that the tax is laid only upon transfers of property, *the possession or enjoyment of which the grantor reserves to himself until his death.* It does not cover a case where the grantor parts with the possession or enjoyment of the property *before his death;* on the contrary it reaches only the interest the possession or enjoyment of *which passes from the grantor at his death.*

Historically, the phrase "take effect in possession or enjoyment" is part of the definition of a remainder.

In 2 Fearne on Remainders, sec. 160 (4th Am. ed. 1845), a remainder is described "as limited to *take effect, in pos-*

session, or in enjoyment, or in both, after the regular expiration of another estate."

In 2 Washburn on Real Property (4th ed. 1876), it is said:

> "A remainder may be defined to be an estate or interest in land or tenements to take effect in possession or enjoyment immediately upon the determination of a prior estate." (p. 539)

Also, that it is appropriate to apply "the term possession to corporeal, and that of enjoyment to incorporeal, hereditaments" (p. 536).

Again, it may be said that "possession" is the appropriate word to use in connection with *legal* remainders and that "enjoyment" is properly used when speaking of *equitable* interests.

The above quoted paragraph also appears in 2 Washburn 1st ed. (1860-1862), pp. 222-223, and Matter of Brandreth (169 N. Y. 437, 441) cites the paragraph from the first edition.

A similar definition is found in 2 Blackstone Commentaries, p. 164, 1818 Am. ed. from the then last London edition.

It is clear, from the foregoing, that the phrase "to take effect in possession or enjoyment after" the death of the grantor first used in Pennsylvania in 1826 was taken from the definition of a remainder and that its application could not extend at most beyond transfers which created future interests in property, the possession and enjoyment of which *continued in the grantor until his death.*

Congress thus in 1916 and later provided for the taxation of a type of transfer universally known in legal and historical fields and that type of transfer is neither to be enlarged nor contracted by interpretation. The Act of Congress identifies the subject matter and history and the law supplies its characteristics.

> "In a matter of this import, the reasonable presumption is that the words . . . were used, not loosely, but with regard to their established legal significance, and in construing a statute a technical meaning should be given to technical words, unless a contrary meaning is unmistakably intended." People v. Wainwright, 227 N. Y. 407, 412.

Having regard to the legal and historical significance of the phrase "to take effect in possession or enjoyment at or after death," it is impossible to apply it to a mere possibility of a reverter in a grantor who had transferred the possession and enjoyment of property to another and who, at his death, had no *particular* estate in the property, which any *future* interest therein could follow.

Pages 22 to 33 of Brief for Respondents in *Helvering* v. *Duke*, 290 U. S. 591, discuss some of these propositions at greater length, and we hereby refer to them.

Respectfully submitted,

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Washington, D. C.,
October 24, 1935.